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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 917

ROOFIRE ALARM COMPANY,
Petitioner,

vs.

UNDERWRITER'S LABORATORIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. NELSON IRVINE,
JOHN A. CHAMBLISS,
1111 Maclellan Building,
Chattanooga, Tennessee,
Attorneys for Petitioner.

APPEAL REPRODUCTIONS CO., P. O. Box 372, 3214 W. Church Avenue, Knoxville, Tenn.

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UNDERWRITER'S LABORATORIES, INC.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on October 11, 1966.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Tennessee (Appendix A) is reported as 188 F. Supp. 783. The opinion of the Court of Appeals for the Sixth Circuit (Appendix B) is reported as 284 F. 2d 360. The judgment from which relief is sought on

October 11, 1966 (Appendix C) is not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

(a) Whether petitioner under F.R.C.P. 60(b) should be relieved from the operation of a declaratory judgment finding respondent was clearly not established for public welfare, since it now appears respondent has obtained tax-exempt status as a corporation testing for public safety.

(b) Whether petitioner under F.R.C.P. 60(b) should be relieved from the operation of a declaratory judgment holding respondent is properly fulfilling the obligation set out in its certificate of incorporation and could arbitrarily refuse to test since it now appears respondent borrowed its corporate purposes as expressed in its Charter, and has obtained tax-exempt status as a corporation testing for public safety.

STATUTES INVOLVED

The material language of the statute which warranted the application for exemption from income tax is found in 26 U.S.C., Section 501 (c)(3), and reads:

"Corporations *** operated exclusively for *** testing for public safety ***"

FEDERAL RULES OF CIVIL PROCEDURE 60(b)

The material language of Rule 60(b) reads as follows:

"On motion upon such terms as are just, the Court may relieve a party *** from a final judgment, order, or proceeding for the following reasons:

"*** It is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

STATEMENT OF THE CASE

This case arises out of a request that the Laboratories test and report on the results of testing a basic heat detector on which a patent was granted to the licensor of the plaintiff. Jurisdiction arises out of diversity.

The Laboratories is a non-profit corporation. Its Charter function is testing for public safety. The Charter specifies that the Laboratories shall "publish and circulate the results."

Roofire requested that be done.

The District Court following the opinion in *Underwriters' Laboratories, Inc., v. Commissioner of Internal Revenue*, 135 F. 2d 371, Certiorari denied 320 U.S. 756 (1943), held the Laboratories "could arbitrarily refuse to test any device ***, it is clearly not established for public welfare."

Roofire moved for relief under Rule 60(b) as the Laboratories position has reversed from that of a non-exempt private corporation to that of a public welfare tax exempt corporation granted exemption because it represented in an application it tests for public safety; without emphasis on the fact that it does not publicize its opinions as to items it considers not safe for the public to use.

ARGUMENT

June 3, 1966, petitioner requested the respondent to test the device and give publicity to the results. Making a prospective application of the declaratory judgment respondent declined saying:

> "As you know, this very request has been found by the Court to be without merit in the litigations which you brought against the Laboratories, Roofire Alarm Company vs. Underwriters Laboratories, Inc., 188 F. Supp. 753, (E.D. Tenn. 1959); affirmed 284 F. 2d 360 (6th Cir. 1960)"

It thus clearly appears that the respondent relies on the declaratory judgment petitioner seeks relief against.

The Underwriters Laboratories, Inc., operates the most widely known testing laboratories in the United States. It is sponsored and controlled by the largest association of fire insurance corporations in the United States. Both the laboratories and the insurance associations are presently exempt from income taxes. Both exercise a constructive and helpful function. Both are supreme in their field. Together these two dominate the actions and control the scope of fire protection in the United States. These assertions are elaborately evidenced by the record in the case last referred to, 320 U.S. 756.

The tax exempt status of the Laboratories is of wide public significance in establishing a working rule to heed in the push for exemptions. In a 1966 book, "Associations and the IRS," published by the Chamber of Commerce of the United States, there are discussions on the exemption outlook. The author, George D. Webster, discusses the actions of the respondent. It is referred

to on pages 3 and 41 in some detail.

The most elaborate and clear showing as to the Laboratories action is in "Tax Techniques in Foundations and other Exempt Corporations," by Stanley S. Weithorn. The author has eight different references to the 1943 case, we need not deal with his comments but pages from this authority are set out (Appendix D). They do not support the exemption. Due to the digest system, neither of these authors appear to have been aware of this case, as it is not a tax case.

A similar and related discussion to the same effect appears in New York University 14th Annual Institute in Federal Taxation on pages 23, 27, 44 and 100 (Volume 14).

The advertising power and influence of the Laboratories operations are emphasized in its booklet, "Testing for Safety," filed as an Exhibit to its answer. All devices that meet its test are listed in booklets and in card systems. A charge (minimum of $50.00 per year) is made to continue listing of a device. It shows clearly that a manufacturer whose device is what the Laboratories care to tell the public of becomes a customer who pays yearly for the listing (advertisement) while others who may mislead the public are ignored and this means the public's safety is ignored. No mention is made of any rejected devices tested, no criticism, no appraisal, no advice to the public. These assertions are supported by the record in this case.

(a) The National Fire Protection Association advises the public against the use of devices that the Laboratories does not list. These two and the sponsor of the Laboratories exert a combined trade control.

The collaboration in *Radiant Burners v. Public Gas Light and Coke Company et al*, 364 U.S. 656 (1961) was similar. It centered on the American Gas Association (AGA). There the membership declined to permit use of burners that AGA did not approve. Here the block is created by not listing. This influence over fire protection organizations extends all over the United States. The respondent's booklet explains the scope of its controls.

(b) Not since *Helvering v. Coleman-Gilbert Association*, 296 U.S. 369 (1935) as our search develops, has there been a decision discussing the operations and limits to be observed by those that enjoy income tax exemption. It held charter provisions cannot be negatived. The lower Courts were reversed and the organization held obligated to abide by the terms of its basic setup.

Not only do the facts found in the record filed in *Underwriters' Laboratories v. Commissioner* when before the Court for Certiorari 320 U.S. 756, support our summation; a look at the record in *Roofire Alarm v. Royal Indemnity* in which Certiorari was denied in 1963, 373 U.S. 949, will disclose the wide extent of the controls exercised by these three affiliated organizations.

The Tax Court in 46 BTA 464, the Court of Appeals in an opinion by Judge Minton (later Mr. Justice Minton), a rather scathing opinion, and this Court all three agreed that what the Laboratories did then was not tax exempt.

And now its performance is the same and it has secured exemptions. The efforts that resulted in the exemptions involved an amendment to the law, included a closed Senate Committee session and an inadvertent failure to show that some tests are not publicized.

Three features of this case seem to warrant consideration by this Court:

(1) The appealing statement in *Hammerstein vs. Kelley*, 235 F. Supp. 60 at p. 62:

> "The United States Supreme Court has said very little in this area of exempt charities and there are few clear decisions on it from other courts."

(2) The audacity of the respondent in securing exemption though still functioning as set forth in 135 Fed. 2d 371, that case pointing out that such functions are not exempt; and

(3) If this petition is denied, respondent probably will later plead former judgment setting up the judgment against which relief is sought, and its implied approval.

Surely the relief sought here calls for an application of the rule which grows out of the establishment by Lord Bacon of the Bill of Review.

The Laboratories has elected to give assurances to the Commissioner and did assure the Congressional Committees that it should be exempt because "testing for public safety." It should not cut that obligation short by ignoring a Charter obligation.

Respectfully submitted,

J. NELSON IRVINE,
JOHN A. CHAMBLISS,
1111 Maclellan Building,
Chattanooga, Tennessee,

Attorneys for Petitioner.

Appendix A

[188 F. Supp. 753 (1959)]

ROOFIRE ALARM COMPANY,

v.

UNDERWRITERS' LABORATORIES, INC.

Civ. A. No. 3248.

United States District Court
E. D. Tennessee, S. D.
June 18, 1959.

Action by manufacturer of fire warning device to compel private nonprofit testing corporation to change its standards as to fire warning devices, so that manufacturer's device might be approved. The District Court, Darr, Chief Judge, held that the establishment of standards under which testing corporation would approve products after testing was an internal operation, and corporation's requirement that warning sound of fire warning device continue for at least three minutes at full intensity did not violate any public policy and was not so unreasonable as to justify entry of a judgment compelling corporation to change its standards.

Summary judgment in favor of defendant granted and action dismissed with prejudice.

1. Torts 6

Manufacturer of fire warning device was not entitled to the approval of private nonprofit testing corporation of manufacturer's product as of right, and testing corporation could arbitrarily refuse to even test any device

without necessarily incurring liability.

2. Corporations 393

It is not a function of the courts to interfere with the internal workings of corporations in exercising their discretion within legal limits.

3. Torts. 6

The establishment of standards under which private nonprofit testing corporation would approve products after testing was an internal operation, and corporation's requirement that warning sound of fire warning device continue for at least three minutes at full intensity as a prerequisite to its approval did not violate any public policy and was not so unreasonable as to justify entry of a judgment compelling corporation to change its standards.

John A. Chambliss, Chattanooga, Tenn., for plaintiff.

Miller, Martin, Hitching & Tipton, Chattanooga, Tenn., for defendant.

DARR, Chief Judge.

This is a declaratory judgment suit filed by Roofire Alarm Company, the licensee of a patented fire alarm device, against the Underwriters Laboratories, Inc. Both parties have filed motions for summary judgment, the defendant on broad, general lines and the plaintiff as to whether the defendant is properly fulfilling the obligations set out in its certificate of incorporation. Rule 56(c), Federal Rules of Civil Procedure, 28 U.S.C.A., provides that a judgment shall be rendered provided that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment

as a matter of law. In the present case no genuine issue of fact appears to exist.

The defendant Underwriters' Laboratories is a non-profit corporation organized by and for the stock fire insurance companies of the United States, and one of its functions is to test fire warning devices and make reports on the results of such tests. A portion of the certificate of incorporation, relating to the objects and purposes of the corporation, reads as follows:

> "By scientific investigation, study, experiments, and tests, to determine the relation of various materials, devices, constructions, and methods to life, fire, and casualty hazards, and to ascertain, define, and publish standards, classifications, and specifications for materials, devices, constructions, and methods affecting such hazards, and other information tending to reduce and prevent loss of life and property from fire, crime, and casualty."

The plaintiff alleges that "this charter obligation and the reputation of the defendant have developed an occupation and course of conduct affected with a public interest," and then asserts that the defendant has an obligation to be reasonable with and not discriminate against the plaintiff.

The device of the plaintiff consists of two carbon dioxide filled capsules enclosed in a metal tube with crimped ends. When heated, the capsules explode, thereby warning people in the vicinity. This device was presented to the defendant for testing, and was found not to meet their standards for single station fire alarms. One requirement which this device failed to meet was that "the warning sound continue for at least three minutes at full intensity." Apparently the plaintiff feels that this requirement is unreasonable, and that this Court

should so determine, and require the defendant to change its requirements. This the Court declines to do.

[1] The defendant is not the only testing laboratory available to the plaintiff. Approval by the defendant is not available as of right, and the defendant—or another such laboratory—could arbitrarily refuse to even test any device without necessarily incurring liability. As pointed out in Underwriters' Laboratories v. Com'r of Int. Revenue, 7 Cir., 135 F. 2d 371, the defendant is a business league formed to perform services ordinarily conducted for profit. It is clearly not established for public welfare, but for private gain—not to pay dividends to stockholders, but to benefit qualifying manufacturers and insurance companies (its "stockholders") through reduced fire losses.

[2, 3] By limiting its approval of devices and by directly or impliedly indicating that unapproved devices may be less desirable to buyers of such devices, it has made its approval a desirable and financially rewarding goal. To require it to approve a device, and to lower, or change, its standards would, to some degree, decrease the desirability of the goal. It is not a function of the courts to interfere with the internal workings of corporations in exercising their discretion within legal limits, and the establishment of the standards which are here involved is an internal operation that does not violate any known public policy.

In the present case the defendant examined the plaintiff's device, and declined to accept it for a clear failure to meet the standards set by the defendant. The standards set do not appear to this Court to be so unreasonable as to justify the entry of a declaratory judgment for the plaintiff.

The plaintiff's motion is denied. The defendant's motion for a summary judgment in its favor is granted, and the suit dismissed with prejudice.

Order accordingly.

Appendix B

[284 F. 2d 360]

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(October 19, 1960)

ROOFIRE ALARM COMPANY,
Appellant,

v.

UNDERWRITERS' LABORATORIES, INC.,
Appellee.

Samuel M. Chambliss, Chambliss, Chambliss & Hodge, Chattanooga, Tenn., for appellant.

Jere T. Tipton, Miller, Martin, Hitching & Tipton, Chattanooga, Tenn., and Edward H. Hickey, Bell, Boyd, Marshall & Lloyd, Chicago, Ill., on brief, for appellee.

Before McALLISTER, Chief Judge, and MARTIN and O'SULLIVAN, Circuit Judges.

ORDER.

This is an appeal by plaintiff from an order of the trial court, sustaining the motion of defendant for summary judgment and dismissing the complaint.

For the reasons stated in the opinion of District Judge Darr, adequately expressed, the order of the United States District Court is affirmed. 188 F. Supp. 753.

It is so ordered.

Appendix C

NO. 14,060

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROOFIRE ALARM COMPANY,
Plaintiff,

v.

UNDERWRITERS' LABORATORIES, INC.,
Defendant.

} ORDER

(Filed October 11, 1966)

Before O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

THIS CAUSE having come on to be heard upon a pleading of the above named plaintiff entitled "Motion To Be Relieved Of Final Judgment," the brief in support thereof, and the brief of defendant in opposition thereto, and upon due consideration,

IT IS ORDERED that said motion may be, and it is, hereby denied.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

TAX TECHNIQUES IN FOUNDATIONS AND OTHER EXEMPT CORPORATIONS

CHAPTER 9

Organizations Testing for Public Safety

Stanley S. Weithorn

SYNOPSIS

§ 9.01 "Testing for Public Safety" Defined
§ 9.02 Purpose of the Exemption
§ 9.03 Deductibility of Contributions

§ 9.01 "Testing for Public Safety" Defined

I.R.C. § 501(c)(3) exempts from income taxation organizations "organized and operated exclusively for . . . testing for public safety." The Regulations state that the term "testing for public safety" includes "the testing of consumer products, such as electrical products, to determine whether they are safe for use by the general public." Reg. § 1.501(c)(3)-1(d)(4).

§ 9.02 Purpose of the Exemption

Prior to the enactment of the 1954 Code, organizations dedicated to testing for public safety were not specifically exempt from tax so that, if exemption were sought, it was necessary to qualify as a scientific organization.

There have not been any interpretations, either administrative or judicial, involving organizations whose purpose is to test for public safety since the specific incorporation of that category into the statute. Under

the 1939 Code, however, there was one pertinent case, involving an organization sponsored by an association of fire insurance companies, that conducted experiments and studies into the causes of fire and tested the resistancy of different types of materials. The results of these research projects were provided to manufacturers in order to assist them in choosing those materials which were the most fire-resistant. Although a portion of the research costs was borne by the sponsoring fire insurance companies, the bulk of the financing came from manufacturers. The court held that the organization was not entitled to tax exemption, since private rather than public interests were being served. *Underwriters Laboratory, Inc. v. Commissioner*, 135 F. 2d 371 (7th Cir. 1943), cert. den. 320 U.S. 756.

OBSERVATION: A specific exemption for organizations "testing for public safety" apparently was included in the 1954 Code solely for the purpose of overruling the *Underwriters Laboratory* decision.

§ 9.03 Deductibility of Contributions

It is puzzling that organizations engaged in testing for public safety are exempt under I.R.C. § 501(c)(3) since, unlike the case of other organizations described therein (e.g., charitable, religious, educational, and scientific organizations), donations to "testing for public safety" organizations are not deductible as charitable contributions. I.R.C. § 170(c); Reg. § 1.170(c). Thus, it would have been more logical to provide exemption for such organizations under another subparagraph of I.R.C. § 501(c) (e.g., that covering business leagues or even civic organizations) since organizations covered by all other such subparagraphs also are of the type contributions to which are not deductible.

In another case, the Underwriters' Laboratories of Chicago was formed by certain fire insurance companies for research and publicity purposes in connection with fire hazards and risks. It was held not exempt, where its income was derived from fees charged manufacturers for testing apparatus and equipment and approving and publicizing such apparatus and equipment as met those tests. *Underwriters' Laboratories, Inc. v. Commissioner*, 135 F. 2d 371 (7th Cir. 1943), cert. den., 320 U.S. 756.

In connection with *Underwriter's Laboratories*, see Gray, "What is 'Research' for Purposes of Exemption," *Proc. N.Y.U. 5th Biennial Conf. on Charitable Foundations* 233 (1961). In this article, the author states the following, at page 244:

> Under the Regulations research must be carried on for the exempt purpose of the organization in the public interest. What constitutes research has been fairly liberally interpreted in the courts. In the case of scientific organizations, there is a small area of what does not constitute research. However, the Treasury Department has recognized that in many instances a subordinate private interest may be permitted in order to achieve research in the public interest.

It is interesting to note that by virtue of a change effected by the 1954 Code (§ 501(c)(3)) this organization is now exempt as a scientific organization since it is engaged in "testing for public safety."

In 1958, the American Council of Independent Laboratories objected very strongly to this exemption in public hearings before the Ways and Means Committee of the United States House of Representatives, characterizing it as "unfair tax-favored competition," as follows:

> The broad sign of business activity which could be included under "testing for public safety," as now so loosely defined, should be of concern to all persons interested in fair taxation . . . it should be pointed out that the testing of foods, drugs, construction and building materials . . . is certainly equally important in determining whether they are safe for use by the general public. [Hearings before Ways and Means Committee on General Revenue Revision, 85th Cong., 2d Sess., Pt. 2, pages 1744-1750 (1958).]

* * *

§ 32.03[1] Denial or Loss of Exempt Status 32-14

An extreme example of an organization denied exemption because its primary function was for the profitable purposes of its membership rather than for charitable purposes is presented by the factual situation in ***Underwriters' Laboratories, Inc. v. Commissioner***, 135 F. 2d 371 (7th Cir. 1943). There, a corporation (1) conducted research and investigations pertaining to insurance hazards, furnishing its membership with the resultant data, and (2) operated a scientific testing service which charged fees for its work.

NOTE: For a discussion of the 1954 enactment that accorded exempt status to organizations "testing for for public safety" see Chapter 8.

* * *

§ 33.08 Financing of Private Projects

Although a special interest of the donor may be furthered by a foundation, exemption generally will not be granted unless there is a public purpose and others in addition to the donor are benefited. See, e.g., *Mabee Petroleum Corp. v. United States*, 203 F. 2d 872 (5th Cir. 1953); *Best Lock Corporation*, 31 T.C. 1217 (1959). Thus, if the foundation is used as nothing more than the alter ego of the donor, by its fostering of the donor's private projects, it will not qualify for exemption. In this connection, the court in *Underwriters' Laboratories, Inc. v. Commissioner*, 135 F. 2d 371 (7th Cir. 1943), stated: "This does not sound like charity to us. If it is charity, it began at home. It was not the public interest that prompted the establishment of the petitioner."